Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

JULIE K. MCCAMMON, M.D.,

Petitioner,

v.

WILLIAM L. FRAME AND THE
WEST VIRGINIA TRIAL LAWYERS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Harrison County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it a violation of the Due Process Clause of the Fourteenth Amendment to deny a motion for disqualification of a trial judge who is married to a member of the defendant association, and who then holds in favor of the defendant?

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PETITION FOR A WRIT OF CERTIORARI

Julie K. McCammon, M.D., respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Harrison County, West Virginia.

OPINIONS BELOW

The West Virginia Supreme Court denied petitioner's motion before the Circuit Court of Harrison County to recuse the presiding judge, and directed the county clerk to enter its unpublished order (App., *infra*, 11a-12a). The Circuit Court then subsequently granted respondents' motion to dismiss, also in an unpublished opinion (App., *infra*, 15a-20a). The Supreme Court of Appeals of West Virginia then denied petitioner's Petition for Appeal on September 9, 2004 in an unpublished opinion (App., *infra*, 1a-2a).

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia was entered on September 9, 2004 and petitioner timely filed this Petition for a Writ of Certiorari on December 6, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST., AMEND. XIV.

STATEMENT OF THE CASE

At issue here is simply this: may a judge preside over a lawsuit while being married to a member of the defendant association, and then hold in favor of that entity? The Due Process Clause of the Fourteenth Amendment guarantees to all litigants, at a minimum, a fair and impartial tribunal. The proverbial "day in court" available to a plaintiff must include a decision by an impartial judge free of actual or apparent conflict. All the procedural protections in the world amount to nothing if the ultimate decision is made by someone closely connected with one of the parties. Petitioner Julie K. McCammon, M.D., failed to receive the impartiality due to her under the Constitution, and the granting of her Petition here is essential to restore the Fourteenth Amendment right of due process in West Virginia and elsewhere.

The courts below contravened the Fourteenth Amendment by denying petitioner McCammon's motion to recuse the trial judge in light of his marriage to a member of the defendant, respondent West Virginia Trial Lawyers Association ("Association"). Trial judge Booker T. Stephens' wife is an attorney member of that defendant, and upon receipt of petitioner McCammon's motion, Judge Stephens properly requested an opinion from the West Virginia Supreme Court. But the West Virginia Supreme Court violated petitioner's constitutional rights by authorizing Judge Stephens to continue to preside over this case. The West Virginia Supreme Court then repeated its error by failing to correct its ruling on a motion for reconsideration and then a timely appeal.

Specifically, on September 16, 2003, petitioner McCammon moved for disqualification of the trial judge for the following reasons:

- he "received, in his 2000 campaign, contributions from at least twelve (12) past or current members of

the [defendant] West Virginia Trial Lawyers Association";

- "his wife, attorney Gloria M. Stephens, [is] a member of the [defendant] West Virginia Trial Lawyers Association" who also contributed to his campaign;
- there is an "exceptional relationship of the bonds of matrimony" and "[w]ithout question the relationship between the Honorable Booker T. Stephens and his wife, Gloria M. Stephens, attorney and member of the West Virginia Trial Lawyers Association is profound and not casual in nature, further bringing his impartiality into question"; and
- "any objective observer would reasonably question the impartiality of the Honorable Booker T. Stephens using the objective standard upon which motions for recusal of a judicial officer are based."

App., *infra*, 6a-7a.

On September 19, 2003, Judge Stephens admitted the factual basis for the motion and forwarded the issues to West Virginia Chief Justice Larry Starcher for advice. *Id.* at 8a-10a. In advising against disqualification, Justice Starcher failed to address the factual admissions or the issue of the position of Justice Stephens' wife with the defendant Association. *Id.* at 11a-12a. His terse denial stated that Judge Stephens did "not wish to recuse himself voluntarily from presiding in said case." *Id.* at 11a. Petitioner McCammon preserved her objection by seeking reconsideration by Chief Justice Starcher. *Id.* at 13a-14a. She noted that the first judge in the case had been recused for less serious reasons:

> It seems implausible that this court, which has already removed one judge secondary to a remote professional relationship, would allow a judge to continue to preside over a case in which the judge's wife is a defendant. The

> relationship between myself and Judge Bedell, having delivered his child nine years ago, pales in comparison to the relationship between Judge Stephens and his wife, as it relates to this case.
>
> Any objective observer would question the impartiality of the Honorable Booker T. Stephens in presiding over this civil action.

Id. Neither the West Virginia Supreme Court nor its Chief Justice Starcher responded to petitioner McCammon's request for reconsideration.

This left petitioner McCammon with the task of arguing against the respondent Association before a presiding judge married to one of its members. Respondent Association, through agreement among its members, advances their interests and pursues a common agenda. This Association provides information and training to its members in how to file malpractice actions. This Association had even formed a task force on malpractice to promote its goals. Like any trade association, the West Virginia Trial Lawyers Association is subject to legal process and must be fully accountable in court for harm that its conduct causes.

In West Virginia between the years of 1993-2003, there has been quite a bit of unjustified and avoidable harm. In information obtained from the West Virginia medical board, there were 941 dismissals and 291 verdicts in favor of physicians, totaling over 1232 unjustified actions that required enormous expense to defend. (Docket Entry #95) The attorneys who brought these actions were nearly entirely members of the Respondent West Virginia Trial Lawyers Association. Many surely acted on information and training provided by the Association in the form of continuing legal education courses. Some were likely influenced by the task force organized and promoted by the Association with substantial publicity. The wasteful expense caused by this vast number of frivolous malpractice actions totals $50

million or more in direct costs, assuming an average cost of defense of only $40,000. The indirect costs of compelling physicians to practice unjustified, defensive medicine are orders of magnitude larger. These costs were borne by petitioner Julie K. McCammon, M.D., other good West Virginian physicians, and their patients.

For 15 years petitioner Dr. Julie K. McCammon has well served the people of West Virginia by delivering their babies at all hours of the day and night. Practicing in the field of obstetrics and gynecology (OB/GYN), she has an excellent record of providing high quality medical care to the patients in her community of Clarksburg and surrounding areas. She delivered the child of the first judge assigned to this case, Judge Thomas A. Bedell, who was disqualified for that reason by the West Virginia Supreme Court over his protest. She provides care in an underserved area that does not attract obstetricians easily. She is on call around the clock, available to travel to the hospital and deliver a baby at any time of day or night. However, her financial ability to continue practicing in West Virginia has been jeopardized by conduct and litigation tactics of the members of respondent West Virginia Trial Lawyers Association, acting in part on the recommendations, training and information provided by the Association.

Petitioner McCammon has personally bore the brunt of not one, but two frivolous malpractice actions. In *Shelley S. McDougal and David L. McDougal v. Julie K. McCammon, M.D.*, Civil Action No. 92-C-513-1, Circuit Court of Harrison County, West Virginia, respondent West Virginia Trial Lawyers Association members E. William Harvit, Bradley R. Oldaker, Sterl F. Shinaberry, and Frank Venezia prosecuted a baseless action against Dr. Julie McCammon. Dr. McCammon prevailed, but at a substantial expense. The other 1231 meritless malpractice actions caused similar harm to others. Likewise, a second lawsuit against Dr. McCammon was dismissed in *Brooke Danielle Lough v. Julie K.*

McCammon, M.D. and United Hospital Center, Civil Action No. 00-C-287-2, Circuit Court of Harrison County, West Virginia.

Twice victimized by unjustified lawsuits filed against her personally, petitioner McCammon has suffered increases in malpractice coverage by virtue of these and numerous other frivolous actions against her colleagues. Her complaint alleged that respondents "have engaged in the institution of frivolous, non-meritorious, and malicious lawsuits" and have acted in a "civil conspiracy" that has directly and proximately caused harm to petitioner. App., *infra*, at 4a.

By fomenting numerous malpractice lawsuits, the respondent Association has driven up McCammon's malpractice insurance rates to unconscionable levels. In 2003, her premiums increased to $115,000 a year and the cost of her tail coverage if she were forced to close her practice rose to $240,000. This is despite the fact that there has never been a successful malpractice claim ever filed against her. She is paying for the likelihood of additional expense for frivolous malpractice claims against her and other physicians. The respondent Association, in fostering, promoting, and training attorneys to bring these cases, proximately caused this financial injury to petitioner McCammon.

In the proceeding below, petitioner McCammon made a small number of reasonable discovery requests to enable her to prove the alleged civil conspiracy and malicious prosecution of frivolous actions. Specifically, she requested documents including the following:

> (1) "All minutes of meetings and documents pertaining to the West Virginia Trial Lawyers Association task force (executive committee plus medical malpractice task force)."
>
> (2) "All documents and pleadings pertaining to medical malpractice cases that have been filed by [respondent] William L. Frame or in which Mr. Frame has

participated (including medical malpractice claims filed by his firm) that have been dismissed or resulted in a defendant verdict at trial."

3) "All continuing law education courses sponsored by the West Virginia Trial Lawyers Association since 1988 re: medical malpractice litigation (send all program syllabi and all printed information)."

(4) "Copies of all information on the West Virginia Trial Lawyers Association website including all information obtainable through restricted access."

(5) "All fliers/information sent to the legislature from the West Virginia Trial Lawyers Association with regard to medical malpractice/medical malpractice legislation since 1988."

(Docket Entries ##10, 62, 73).

Respondents, however, refused to comply with several of these requests, provided incomplete information with respect to one, and implausibly claimed that they had no responsive document to others. (Accompanying Docket Entry #95) Specifically, respondents did not comply at all with requests numbered (2) and (4) above, denying petitioner McCammon access even to the respondent Association's own website. Respondents then moved for summary judgment and cut off discovery.

On November 25, 2003, the trial court held a hearing. Counsel for respondents made the first argument: "I think discovery ought to wait until the court rules on a summary judgment. That's all I have." (Nov. 25, 2003 Hearing Tr. at 2). In response petitioner McCammon stated that:

I have received essentially no discovery in this case. I have been forced to file motions to compel times two. The first motion was filed in July, the second motion having been filed in October. I have received a mere three items from the Defendant. Other - they have not complied with any of the asked - for discovery, including

> written discovery. I have been denied depositions. I feel at this time the motion to stay th[is] discovery should be denied and that I have been denied my rights per rules of the rules of civil procedure to and discovery and motions to compel have yet to be addressed.

Id. at 3. The court asked respondents' counsel if he wished to reply, and he simply said, "No, your Honor." *Id.* Petitioner then requested extension of discovery to obtain compliance with her requests. *Id.* But on December 3, 2003, the circuit court entered an order granting respondents' motion to stay discovery, preventing petitioner McCammon from obtaining materials relating to the Association's website or its task force on malpractice relevant to proving her claims.

On December 4, 2003, the court below granted respondents' motion for summary judgment "as a matter of law." App., *infra*, at 18a; *see generally id.* at 15a-20a. This was a final order, from which plaintiff filed a timely petition for appeal within the extended deadline. *Id.* at 21a. The West Virginia Supreme Court denied the petition on September 9, 2004, *id.* at 1a-2a, from which petitioner files this timely appeal.

REASONS FOR GRANTING THE PETITION

"It is unreasonable that any man should determine his own quarrel." 1 W. Blackstone, *Commentaries* *91. Yet in state court and administrative proceedings nationwide, impartiality is tainted by real and apparent conflicts of interest. Federal law prohibits such conflicts in federal court. 28 U.S.C. § 455. This statute merely embodies the due process principle that a judge may not preside over a case in which he has an interest. *See Spencer v. Lapsley*, 61 U.S. 264, 266 (1858) ("The [predecessor] act of Congress proceeds upon an acknowledgment of the maxim, 'that a man should not be a judge in his own cause,' and requires a judge found in that predicament, on the motion of either party, to make an order for the removal of the cause to another competent

jurisdiction."). But outside of federal court, basic standards of fairness are routinely ignored in violation of the Due Process Clause of the Fourteenth Amendment. It is imperative that this Court grant certiorari in this case to draw a clear line protecting impartiality in state court.

Petitioner Dr. McCammon has a due process right to an impartial tribunal. The presiding judge below should have been disqualified from deciding this case. It was a violation of petitioner's constitutional right for Judge Stephens, upon instructions by Chief Justice Starcher, to remain on this case after the disclosure and admission that Judge Stephens' spouse belonged to the respondent West Virginia Trial Lawyers Association. The appearance of partiality and the risk of actual bias were too strong for a judge to decide a case in favor of respondent Association to which his spouse belongs. Petitioner McCammon is entitled to adjudication free from any appearance of partiality or actual bias.

Plaintiff McCammon never received fair discovery in this action to uncover how the respondent Association was training, advising, and advancing the financial interests of its members to her detriment. The court's decision below simply parroted the arguments of respondent Association to misconstrue petitioner's action as one in negligence when in fact it alleges an intentional tort. Petitioner McCammon complained of malicious prosecution and civil conspiracy, neither of which requires proof of any duty or breach of duty. Yet the court below dismissed petitioner's complaint for want of a duty owed by respondents to her. The appearance of a conflict of interest between the judge and respondent Association impermissibly tainted the erroneous result.

I. THE DECISION BELOW DEPARTS SHARPLY FROM OTHER COURTS OVER WHEN A CONFLICT OF INTEREST BY A JUDGE'S SPOUSE VIOLATES THE DUE PROCESS CLAUSE.

"[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. ... [R]elationships must be considered." *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added). This principle is so firmly rooted in philosophical and moral thought that it can hardly be questioned. The noted philosopher and mathematician Blaise Pascal observed that "[i]t is not permitted to the most equitable of men to be a judge in his own cause." Blaise Pascal, *Thoughts, Letters and Opuscules* 182 (O. Wight transl. 1859). In pressing his argument for a large republican government to check the inevitable factions, James Madison restated this maxim in his famous *Federalist No. 10*:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are [*sic*] unfit to be both judges and parties at the same time.

The Federalist No. 10, at 79 (C. Rossiter ed. 1961). That "corrupt" effect included the ills of factions, which could only be restrained by republicanism. More succinctly, this Court declared: "'No one should be judge in his own cause.'" *Gutierrez de Martinez v. Lamagno,* 515 U.S. 417, 428 (1995) (quoting the former slave Publius Syrus, *Moral Sayings* 51 (D. Lyman transl. 1856)).

Yet West Virginia decided differently in allowing an appearance of conflict due to the financial and emotional

interest of a judge's spouse. The financial interests of one's spouse are typically identical to oneself, given the common manner in which property is held and income is taxed. For example, the filing of joint income taxes by spouses is the norm. It surely violates the Due Process Clause for a judge to preside over a lawsuit against his spouse, or against his spouse's company or organization. Yet West Virginia allowed this appearance of impropriety.

The decisions below depart from fundamental principles of due process. This Petition for a Writ of Certiorari should be granted to remove the resulting conflict in due process standards.

A. THE DECISION BELOW CONFLICTS WITH THE STANDARD THAT "NO MAN CAN BE A JUDGE IN HIS OWN CASE"

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. ... This Court has emphasized that 'every procedure which would offer a *possible temptation* to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *In Re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), emphasis added).

In *Tumey*, this Court reversed a conviction whereby the presiding judge was paid from the fines collected by such convictions. The pecuniary interest there was small in a given case, comparable to the financial interest here, where the presiding judge's spouse was a member of the defendant Association. The *Tumey* Court held that "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." *Id.* at 522 (citing

numerous precedents). This Court noted that precedents at common law in England prior to the American Revolution overturned decisions in which the judge had the slightest pecuniary interest. "[I]n analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." *Id.* at 524 (citations omitted).

Here, trial judge Stephens' wife had the "slightest" pecuniary interest as a member of the defendant Association. The Association might raise its dues in response to this litigation by plaintiff McCammon, or even solicit donations from members including the judge's wife. Discovery requests may implicate communications by the judge's wife. She may be subjected to a subpoena, and may feel compelled to hire her own attorney in defense. She plainly has a pecuniary interest.

Here there is the "possible temptation to the average man" to be partial to the defendant, triggering the due process requirement for disqualification set forth in *Murchison*, quoted *supra*. Judge Stephens conceded that his attorney wife is a member of the respondent Association. (*Compare* App., *infra*, 6a-7a ¶ 2 *with id.* at 8a ¶ 2) There is nothing improper about her activity, but it does require disqualifying Judge Stephens in a lawsuit brought against that same entity. Judge Stephens is undoubtedly a man of great integrity, but neither he nor petitioner should be burdened by this appearance of impartiality. Judge Stephens properly requested advice by the West Virginia Supreme Court, which then violated petitioner's due process rights by allowing and condoning this appearance of a conflict of interest.

The irony is that petitioner McCammon had an impartial judge initially assigned to this case. Judge Bedell lacked any ongoing or financial interest. But respondents forced his disqualification based on petitioner's having delivered a child for his wife nearly a decade earlier. That was deemed to

present a conflict, while membership in the respondent Association of the spouse of the new judge was not. This turned due process on its head.

"We make clear that we are not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). In disqualifying the judge in *Aetna Life Ins.* for a possible, albeit remote, pecuniary interest, this Court reiterated that "[t]he Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* at 825 (quotations omitted).

Had Judge Stephens allowed this case to proceed to trial, expense and even embarrassment could have befallen members of the respondent Association. Judge Stephens' presiding over the case concerning his wife could have imposed costs on his wife and possibly even public scrutiny. Judge Stephens himself would likely be directly affected by any request or demands for payments by the Association to the extent he files joint income taxes with his wife or otherwise shares financial responsibilities. Under *Tumey*, even small financial burdens require disqualification to avoid the appearance of impropriety.

"The impartiality guaranteed to litigants through the Due Process Clause adheres to a core principle: 'No man is permitted to try cases where he has an interest in the outcome.'" *Republican Party of Minnesota v. White*, 536 U.S. 765, 814 (2002) (quoting *In re Murchison*, 349 U.S. 133 (1955)). As this Court explained in *Republican Party of Minnesota*, "[o]ur cases have 'jealously guarded' that basic

concept, for it 'ensures that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.'" *Id.* (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)). It violated petitioner McCammon's due process rights for the court below to hold against her amid this conflict.

B. THE DECISION BELOW CONFLICTS WITH THE INTERPRETATION OF DUE PROCESS BY OTHER COURTS.

The decision below conflicts with other prevailing standards of due process. Judge Richard Posner reiterated the high standard on this issue in federal courts as follows:

> There are 15 federal district judges in active service in the Northern District of Illinois, all unimpeachably accredited; and yet the union would not try to defend a procedure that let it (or the dissenters!) pick the judge to preside in this case. ... The situation here is even more troublesome. The arbitrator, unlike a federal judge, is not paid a salary that is independent of the number of cases he presides over, or of the goodwill of a litigant. The arbitrator is paid for each arbitration, and this gives him a financial interest in deciding cases favorably to the union -- which hires him, and incidentally which pays him. No man is permitted to try cases where he has an interest in the outcome.

Hudson v. Chicago Teachers Union, Local No. 1, 743 F.2d 1187, 1195 (1984), *aff'd*, 475 U.S. 292 (1986) (citations and quotations omitted).

This impartiality is required by the Constitution, so state courts should not be deviating from it. Yet petitioner

McCammon was victimized by the same potential for bias that Judge Posner describes as unacceptable. Presiding Judge Stephens' wife is allegedly a member of the very civil conspiracy alleged in the action. It is conceivable that she could be called as a material witness, depending on what would be uncovered during a full discovery. That possibility should, at a minimum, compel disqualification of Judge Stephens. As this Court has emphasized, "The goal ... is to avoid even the appearance of partiality.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (quotations and citation omitted). Yet that appearance is unmistakable in this case.

The ruling below conflicts with prevailing norms in other states as well as federal courts. In Colorado, for example, the standard for disqualification would not tolerate what occurred below. "The circumstances here are such that an appearance of impropriety is created by the close nature of the marriage relationship. A husband and wife generally conduct their personal and financial affairs as a partnership. In addition to living together, a husband and wife are also perceived to share confidences regarding their personal lives and employment situations." *Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. Ct. App. 1984). That court noted that "the public views married people as 'a couple,' as 'a partnership,' and as participants in a relationship more intimate than any other kind of relationship between individuals. In our view the existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification, even though no other facts call into question the judge's impartiality." *Id.* This need to prevent the appearance of impropriety applies with even greater force at bar. *See also Holloway v. Hopper*, 852 P.2d 711 (Okla. 1993) (requiring disqualification of a judge because a party sought and received legal advice from the spouse even though neither judge's wife or her law firm entered an appearance in case). The appearance of the potential for Judge Stephens' wife to give him advice during

the pendency of the case is simply too great to allow the conflict.

There is no "necessity" that would justify or excuse any taint of partiality in the proceedings below. "The application of the rule permitting a disqualified judge to act where no other judge is available can be justified only by strict and imperious necessity, since the rule is an exception to the greater rule of disqualification resting on sound public policy. Under the doctrine, **a disqualified judge may sit where no decision is possible if he does not sit**, as in the case of an appellate court where there is no method provided by constitution or statute to have another person sit as judge of the court if a member is disqualified." 46 *Am. Jur. 2d Judges* § 90 (1969) (emphasis added, footnotes omitted). *See also City of Huntsville v. Biles*, 489 So. 2d 509, 514-15 (Ala. 1985). Other judges are available to serve without the conflict cited below.

The federal Court of Appeals for the Second Circuit perhaps put it best:

> Congress has, as noted, provided that **a known financial interest in a party, no matter how small, is a disqualifying conflict of interest and one that cannot even be waived by the parties**. This is a bright-line test that is, as to actual partiality, more than a little overbroad. One share of stock in a large corporation cannot induce a corrupt decision. However, a bright-line test as to equity interests in parties, particularly stock, avoids many difficult line-drawing decisions and is in that sense actually helpful to judges. As Congress has observed, in the absence of bright-line rules, judges are forced to decide the extent of their financial interest at their 'peril,' leaving them open 'to a criticism by others who necessarily had the benefit of hind sight ... [and] weakening public confidence in the judicial system.' H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974

U.S.C.C.A.N. 6351, 6352.

Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 128 (2d Cir. 2003) (emphasis added). As that court observed, "[a] bright-line rule also avoids mistaken but sensationalist accusations of corruption that are wrong -- even dead wrong -- but may further shake public confidence in the judiciary." *Id.* The court below conflicted with this standard which, though codified in 28 U.S.C. § 455, simply articulates the very principles embodied in the Due Process Clause.

The common law has always recognized the unitary interests of spouses in the doctrine of marital unity. *See, e.g.*, *Lang v. Commissioner*, 289 U.S. 109, 111 (1933) ("The tenancy results from the common law principle of marital unity ...."). Married couples ordinarily file joint tax returns, own property jointly, and look out for each others' interests. In the eyes of the common law, the doctrine of marital unity recognized the identity of interests before the law of husband and wife. Federal law also recognizes the obvious: a conflict of interest by one's spouse is imputable to the other spouse. 28 U.S.C. § 455 (b), (c) and (f) (six references to impermissible conflicts of interest based on a marital relationship).

This Court should grant this Petition for a Writ of Certiorari to resolve the conflict created by the ruling below.

II. THE ERRONEOUS GRANT BELOW OF SUMMARY JUDGMENT MAKES IT PARTICULARLY COMPELLING TO REMOVE THE APPEARANCE OF IMPROPRIETY.

The grant of summary judgment below was in error, making the apparent conflict more compelling to correct. Where, as here, the adjudication is erroneous as a matter of law, there is a heightened need to remove the taint of possible impropriety.

The trial judge held that the respondent West Virginia Trial Lawyers Association cannot commit a tort against petitioner because it owes no duty to plaintiff. But petitioner McCammon alleged an intentional tort, not one in negligence. No duty is required for respondents to be liable to petitioner for malicious actions or civil conspiracy. It was simply incorrect for the court below to dismiss the complaint because "no action for negligence can be maintained in the absence of a legal duty," App., *infra*, 17a, ¶ 1, and again, "defendants have no legal duty to the plaintiff which would serve as a basis for the plaintiff's claim against them." *Id.* at 19a, ¶ 9. No legal duty is required to prove an intentional tort.

Specifically, petitioner alleged that respondents "engaged in the institution of frivolous, non-meritorious, and malicious lawsuits against physicians in the State of West Virginia resulting in the unwarranted and stifling increase in the cost of professional liability insurance for the plaintiff, Julie McCammon, M.D." Complaint, *id.* at 4a, ¶ VI. Petitioner also alleged that respondents engaged in a civil conspiracy that caused her harm. These are plainly intentional torts for which no pre-existing duty is required, as explained below.

The tort of filing malicious lawsuits, akin to "malicious prosecution," requires proof of the following elements: "(1) That the prosecution was malicious; (2) that it was without

reasonable or probable cause; and (3) that it terminated favorably to plaintiff." *McCammon v. Oldaker*, 205 W. Va. 24, 29, 516 S.E.2d 38, 43 (1999). Numerous lawsuits are filed against physicians without reasonable or probable cause and are dismissed in favor of the physicians. Petitioner McCammon herself has been personally and repeatedly victimized by this, as reflected in the *McCammon v. Oldaker* case itself. She has suffered harm from the frivolous malpractice actions filed against her colleagues, which have driven up the premiums of her malpractice insurance. The baseless malpractice actions cause physicians and their insurance carriers to incur substantial expenses defending against them, increasing premiums as a direct result. The extent to which these actions are malicious is for the jury to decide, not for resolution based on the pleadings. The court below erred in dismissing the complaint as a matter of law.

This tort is based on intent, not negligence. Yet the court below never addressed the alleged intentional tort. Instead, it applied the rules applicable to causes of action in negligence. "To be actionable, negligence must be the proximate cause of the injury complained of and must be such as might have been reasonably expected too [sic] produce an injury." App., *infra*, 17a, ¶ 3. The lower court's analysis is entirely misplaced, as petitioner did not allege negligence.

Under civil conspiracy, respondents are fully responsible for the actions of their co-conspirators, who have filed malicious actions against petitioner McCammon and others. "[T]he civil conspiracy theory ... hold[s] that one civil conspirator is responsible for the acts of the other co-conspirator." *Politino v. Azzon, Inc.*, 212 W. Va. 200, 204, 569 S.E.2d 447, 451 (2002). The tactics that respondents have pursued, the information they disseminate, and the agreements they forge are all relevant to petitioner McCammon's action in civil conspiracy against them. Her claim does not fail as a matter of law.

"In effect, where the purpose of the combination and competition is a malicious purpose, that is, to destroy another's trade or business, as opposed to simply competing with the other, then a civil conspiracy may legally be found." *Id.* The West Virginia Supreme Court itself has emphasized that civil conspiracy is a valid cause of action. In a decision by that court affirming a $7.85 million award, it reiterated that "[t]he law of this State recognizes a cause of action sounding in civil conspiracy. At its most fundamental level, a 'civil conspiracy' is 'a combination to commit a tort.'" *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753 (1998), *cert. denied*, 525 U.S. 1142 (1999) (quoting *State ex rel. Myers v. Wood*, 154 W. Va. 431, 442, 175 S.E.2d 637, 645 (1970) (citing 15A C.J.S. *Conspiracy* § 1 (1967)). The West Virginia Supreme Court emphasized that "where persons combine not for the purpose of protecting or advancing their own legitimate interests but for the purpose of injuring another in his trade or business, they are guilty of an unlawful conspiracy which, when executed and when damage results therefrom, is actionable ...." *Politino v. Azzon, Inc.*, 212 W. Va. at 204 (quoting 15A C.J.S. Conspiracy § 10(1)). Petitioner McCammon alleged that respondents "have, in combination, acted maliciously and in civil conspiracy, injuring the plaintiff, Julie K. McCammon, M.D., in her profession." Complaint, App., *infra*, 4a, ¶ VII. This suffices as a matter of law and should not have been dismissed.

Petitioner need not allege that the agreements among members of the Association are themselves unlawful. "[A] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff." *Dixon v. American Indus. Leasing Co.*, 162 W. Va. 832, 834, 253 S.E.2d 150, 152 (1979) (citing 15A C.J.S. *Conspiracy* §1(1) and 16 *Am. Jur. 2d Conspiracy* §

44).

In *Kessel*, *supra*, the West Virginia Supreme Court held that "individuals who have conspired with one another to orchestrate and/or carry out a *fraudulent* plan or scheme can be held liable for their conduct." 204 W. Va. at 129, 511 S.E.2d at 754 (citing 37 *Am. Jur. 2d Fraud and Deceit* § 301, at 397 (1968), emphasis in original). Put another way, "one who participates in a fraud is of course guilty of fraud, and one who, with knowledge of the facts, assists another in the perpetration of a fraud is equally guilty." 37 *Am. Jur. 2d Fraud and Deceit* § 305, at 403 & 405 (1968) (citing *Lincoln v. Claflin*, 74 U.S. 132 (1868)). *See also Frazer v. Brewer*, 52 W. Va. 306, 310, 43 S.E. 110, 111 (1902) ("He who adopts the results adopts also the means by which they are brought about."). The respondent West Virginia Trial Lawyers Association relies on lawsuits by its members as its *raison d'etre*, and would plainly benefit from overzealous litigation. The Association fits squarely within the properly alleged cause of action for civil conspiracy.

There is nothing unusual about suing trade associations for civil conspiracy. Indeed, this has been a staple of trial lawyers' own repertoire for some time. *See, e.g.*, *In re North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. 1087, 1096-97 (D.N.D. 1990) (finding a civil conspiracy among members of a trade association to suppress information on asbestos risks). There the plaintiffs alleged that they were injured due to the suppression of information about the health risks of asbestos, and the court agreed that was a proper basis for a civil conspiracy count. *See id.* at 1095. Similarly, petitioner McCammon alleged that she was injured due to the fomentation of frivolous and malicious malpractice lawsuits. Her claim is conceptually similar to the civil conspiracy allegation sustained in the *North Dakota Personal Injury Asbestos Litig.* action, and should not have been dismissed below simply because the shoe was on the other foot.

The New York courts reached the same conclusion about lawsuits against trade associations for civil conspiracy cases. *See City of New York v. Lead Indus. Ass'n*, 190 A.D.2d 173 (N.Y. App. Div. 1st Dep't 1993). That court allowed a cause of action in civil conspiracy against a trade association that was analogous to the respondent Association here. In *Lead Indus. Ass'n*, the court noted that "[t]he manufacturing defendants allegedly coordinated their efforts to conceal the [lead] hazard, to mislead the public and the government as to that hazard, and to market and promote the use of the product despite their knowledge of the hazard." *Id.* at 177. Similarly, the respondent West Virginia Trial Lawyers Association disseminates self-serving claims to the public about the malpractice crisis and arguably misleads the public about the causes of the problem. Furthermore, the respondent Association provides training courses to its members for how to file and prosecute malpractice claims. These are factual matters that petitioner McCammon has a right to develop through full discovery and have decided by a trier of fact, and the premature dismissal of her action was inappropriate.

The court below erred further in dismissing the complaint simply by asserting that "the alleged damage and injury asserted in the petitioner's complaint was not proximately caused by any conduct of these defendants." App., *infra*, 19a, ¶ 9. Determining proximate causation is plainly an issue for the jury, not to be resolved prior to the completion of discovery. "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103-04 (1928) (Andrews, J., dissenting). Determinations of proximate causation are within the province of the jury.

The court below also erred in determining that respondent William L. Frame would somehow enjoy statutory immunity for his role as president of the Association that has been

alleged to be a civil conspiracy. "The defendant, William L. Frame, was the President of the West Virginia Trial Lawyers Association. Mr. Frame served without compensation of the respondent, West Virginia Trial Lawyers Association, which is a non-profit organization. Accordingly, the respondent, William L. Frame, 'shall not be held personally liable for negligence, either through act or omission, or whether actual or imputed, in the performance of the managerial functions performed' on behalf of the defendant, West Virginia Trial Lawyers Association. West Virginia Code § 55-7C-2(4)(c)(i)." App., *infra*, 17a-18a, ¶ 5. But that provision only provides limited immunity for liability for negligence. It does not provide any immunity for gross negligence or intentional torts. Conspiracy is an intentional tort, and thus Section 55-7C-1 *et seq.* offers no protection. William L. Frame avoided and never complied with petitioner's right to depose him, thereby concealing whatever information he has about intentional torts. It was error for the court to dismiss the complaint on this ground.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608
Counsel for Petitioner

Dated: December 6, 2004

APPENDICES

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th of September, 2004, the following order was made and entered:

Julie K. McCammon, M.D., Plaintiff Below,
Petitioner

vs.) No. 041082

William L. Frame and the West Virginia
Trial Lawyers Association, Defendants
Below, Respondents

On a former day, to-wit, June 14, 2004, came the petitioner, Julie K. McCammon, M.D., by Mark Cabannis and Andrew L. Schlafley [*sic*], her attorneys and presented to the Court her petition praying for an appeal from a judgment of the Circuit Court of Harrison County, rendered on the 4th day of December, 2003, with the record accompanying the petition. On the 8th day of June, 2004, came the respondents, William L. Frame and the West Virginia Trial Lawyers Association, by Gregory H. Schillace, Schillace Law Office, their attorney, and presented to the court their written response in opposition thereto.

Upon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

JULIE K. McCAMMON, M.D.
Plaintiff

vs. CIVIL ACTION NO. 03-C-66-2

WILLIAM L. FRAME and the
WEST VIRGINIA TRIAL LAWYERS ASSOCIATION,
Defendants

COMPLAINT

Comes now, Julie K. McCammon, M.D., Plaintiff, and states as follows:

I.

Plaintiff is now and at all times mentioned was a resident of Harrison County, State of West Virginia.

II.

Defendant, William L. Frame, is an attorney who engages in the practice of law with his place of business City of Morgantown, County of Monongalia, State of West Virginia.

III.

At all times mentioned, defendant Frame was and now is an attorney duly authorized to practice law in the State of West Virginia.

IV.

At the time of this complaint, defendant Frame is the President of the West Virginia Trial Lawyers Association.

V.

The plaintiff, Julie K. McCammon, M.D., has practiced medicine in the State of West Virginia since July of 1988.

VI.

Defendants, William L. Frame, and the West Virginia Trial Lawyers Association, have engaged in the institution of frivolous, non-meritorious, and malicious lawsuits against physicians in the State of West Virginia resulting in the unwarranted and stifling increase in the cost of professional liability insurance for the plaintiff, Julie K. McCammon, M.D.

VII.

Defendants, William L. Frame and the members of the West Virginia Trial Lawyers Association, have, in combination, acted maliciously and in civil conspiracy, injuring the plaintiff, Julie K. McCammon, M.D., in her profession.

VIII.

As a direct and proximate result of defendants' actions, the plaintiff, Julie K. McCammon, M.D., has suffered economic loss, professional limitations, emotional distress, mental anguish, and other non-economic damages.

IX.

WHEREFORE, the plaintiff prays judgment against the defendants and each of them as follows:

(1.) In such amounts as are proven at trial.

(2.) In such amounts as determined by the jury.

(3.) For costs of suit herein; and

(4.) For such other and further relief as the Court deems proper.

PLAINTIFF DEMANDS A TRIAL BY JURY

/s/ Julie K. McCammon, M.D.
Julie K. McCammon, M.D.
Plaintiff Pro se

Dated this 12th day of February 2003

APPENDIX C

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

JULIE K. McCAMMON, M.D.,
Plaintiff,

vs. Civil Action No.:03-C-66-2

WILLIAM L. FRAME and the
WEST VIRGINIA TRIAL LAWYERS ASSOCIATION,
Defendants.

MOTION OF THE PLAINTIFF TO DISQUALIFY THE HONORABLE BOOKER T. STEPHENS

The plaintiff, Julie K. McCammon, M.D., in accordance with Rule 17.01 of the West Virginia Court Rules, moves for the disqualification of the Honorable Booker T. Stephens with respect to the above styled civil action. In accordance with the provisions of Canon 3(E) (1) of the West Virginia Code of Judicial Conduct, this disqualification is necessary due to the existence of reasonable questions of impartiality on the part of the Honorable Booker T. Stephens.

1. The Honorable Booker T. Stephens has received, in his 2000 campaign, contributions from at least twelve (12) past or current members of the West Virginia Trial Lawyers Association. See the attached 2000 campaign financial statement of the Honorable Booker T. Stephens and attached lists of members of the West Virginia Trial Lawyers Association.

2. The list of contributors to the 2000 campaign of the Honorable Booker T. Stephens includes his wife, attorney

Gloria M. Stephens, a member of the West Virginia Trial Lawyers Association.

3. The plaintiff believes that she has reasonable justification to question the impartiality of the Honorable Booker T. Stephens. The plaintiff understands the indebtedness a Judge would have to his supporters.

4. The plaintiff also understands the exceptional relationship of the bonds of matrimony. Without question the relationship between the Honorable Booker T. Stephens and his wife, Gloria M. Stephens, attorney and member of the West Virginia Trial Lawyers Association is profound and not causal in nature, further bringing his impartiality in to question.

5. According to Canon 3(E) (1) of the West Virginia Code of Judicial Conduct, a judge should disqualify himself in any proceeding in which his impartiality may be questioned.

6. Furthermore, the defendant submits that any objective observer would reasonably question the impartiality of the Honorable Booker T. Stephens using the objective standards upon which motions for recusal of a judicial officer are based.

7. Attached hereto is the Verification of the plaintiff, Julie K. McCammon, M.D.

WHEREFORE, the plaintiff, Julie K. McCammon, M.D., respectfully requests that the Honorable Booker T. Stephens be disqualified from presiding over any further proceedings or rendering any decisions with respect to the above styled civil action.

Dated this 16th day of September, 2003

/s/ Julie K. McCammon, M.D.

Julie K. McCammon, M.D., pro se
300 Davisson Run Road, Suite 303B
Clarksburg, WV 26330
(304) 622-8383

STATE OF WEST VIRGINIA
EIGHTH JUDICIAL CIRCUIT
McDOWELL COUNTY MAIN COURTHOUSE
POST OFFICE BOX 310
WELCH, WEST VIRGINIA 24801

Booker T. Stephens
Judge

Telephone: (304) 436-8531
Fax: (304) 438-3340

September 19, 2003

The Honorable Larry Starcher, Chief Justice
West Virginia Supreme Court of Appeals
State Capitol Building
Charleston, West Virginia 25301

Re: McCammon v. William L. Frame, et al
Civil Action Number:2003-C-66-2
Circuit Court of Harrison County, West Virginia

Dear Chief Justice Starcher:

Please accept the letter as my response to plaintiff's motion to disqualify in the above styled case.

Paragraph 1 is admitted.

Paragraph 2 is admitted.

Paragraph 3 is denied.

The nature of seeking a judicial office in West Virginia allows a judicial candidate to form a committee to act on his behalf in order to solicit financial contributions for his candidacy. This was done in my campaign for re-election to the Circuit Court Judgeship in McDowell County in 2000. As it turned out, to my good fortune and that of my financial supporters also, I ran unopposed for re-election in 2000. Therefore, my campaign treasurer was directed to return to all financial contributors on a pro rata basis, any contributions they made to my 2000 campaign. I represent that this was done, therefore, I was not then, and am not now financially, or otherwise, indebted to anyone who contributed to my 2000 campaign. Moreover, it should be pointed out that the defendants in this case are William L. Frame and the West Virginia Trial Lawyers Association. William L. Frame of the West Virginia Trial Lawyers Association does not appear under schedule 3A or anywhere else as an individual contributor to my 2000 campaign. Therefore, the plaintiff is not prejudiced in any way because the defendants in this case did not contribute to my 2000 campaign. If a judge is disqualified on the basis asserted by the plaintiff herein, it would set a terrible precedent. There are very few judges, if any, who do not form a campaign committee to solicit contributions in a campaign in West Virginia. If a judge were to be disqualified because of legitimate financial contributions to his committee in accordance with the law, he/she would probably not be able to hear any case concerning any party who could point to an individual who belonged to a certain group, who contributed to his campaign. This is a splendid way, if intended, to shut down the judicial branch of government in West Virginia.

Therefore, based on the foregoing, and under the totality of all the related circumstances, this presiding judge maintains that he is fair and impartial in this matter and further deems that said motion to disqualify is meritless and therefore refuses to voluntarily recuse in this manner.

As further evidence of my impartiality, enclosed is a copy of a transcript of a hearing conducted on defendant's motion for summary judgment on August 28, 2003 for your information and consideration.

Thank you for your kind attention.

Respectfully,
/s/ Booker T. Stephens
Booker T. Stephens, Judge

BTS/ag

Enclosures as stated

Cc: Ms. Julie K. McCammon, M.D.
The Hon. Donald Kopp, Clerk
Mr. Gregory Schillace, Esquire
Mr. James A. Varner, Sr., Esquire

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: JULIE K. MCCAMMON, M.D. VS. WILLIAM L. FRAME AND THE WEST VIRGINIA TRIAL LAWYERS ASSOCIATION, HARRISON COUNTY CASE NO. 03-C-66-2

WHEREAS, By previous Supreme Court Administrative Order entered on May 7 2003, the Honorable Booker T. Stephens, Judge of the Eighth Judicial Circuit, was assigned to the above-styled case in the Fifteenth Judicial Circuit, following the disqualification of the Honorable Thomas A. Bedell, Judge of the Fifteenth Judicial Circuit; and

WHEREAS, the Honorable Booker T. Stephens, has advised the Chief Justice of the Supreme Court of Appeals of a motion filed for his disqualification from presiding in the above styled case; and

WHEREAS, Judge Stephens has further advised the Chief Justice that he does not wish to recuse himself voluntarily from presiding in said case; and

WHEREAS, Upon review of said motion, and in accordance with Trial Court Rule 17.01(e), the Chief Justice has determined that the evidence set out in support of the disqualification motion is insufficient to warrant such disqualification;

IT IS THEREFORE ORDERED, that the Honorable Booker T. Stephens, Judge of the Eighth Judicial Circuit, be,

and he hereby is, directed to continue to preside in the above-referenced case; and

IT IS FURTHER ORDERED, That the Circuit Clerk of Harrison County record this order in the office of said Clerk and provide copies of the same to all parties of record or their counsel.

ENTERED: SEPTEMBER 23,2003

s/ Larry W. Starcher
LARRY W. STARCHER
Chief Justice

Julie K. McCammon, MD
300 Davisson Run Road
Suite 303B
Clarksburg, WV 26301
(304) 622-8383
(304) 623-2565 fax

The Honorable Larry Starcher, Chief Justice
West Virginia Supreme Court of Appeals
State Capitol Building
Charleston, West Virginia 25301

Re: Julie McCammon vs. William L. Frame, et al
Civil Action Number: 03-C-66-02
Circuit Court of Harrison County, West Virginia

September 24, 2003

Dear Chief Justice Starcher,

I am writing this letter in regard to your decision to deny the recusal of Judge Booker T. Stephens in the case styled Julie K. McCammon, MD vs. William L. Frame, et al, Civil Action No. 03-C-66-2 of Harrison County Circuit Court.

It seems implausible that this court, which has already removed one judge secondary to a remote professional relationship, would allow a judge to continue to preside over a case in which the judge's wife is a defendant. The relationship between myself and Judge Bedell, having delivered his child nine years ago, pales in comparison to the relationship between Judge Stephens and his wife, as it relates to this case.

Any objective observer would question the impartiality of the Honorable Booker T. Stephens in presiding over this civil action.

I would like to clarify that there has been no accidental oversight in your decision and that Judge Stephens is married to a defendant in this action.

Thank your for your attention to this matter.

Respectfully,

/s/ Julie K. McCammon, MD
Julie K. McCammon, MD

Cc: Gregory Schillace
PO Box 1526
Clarksburg, WV 26302-1526

James A. Varner, Sr.
McNeer, Highland, McMunn and Varner, L.C.
PO Drawer 2040
Clarksburg, WV 26301

APPENDIX D

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

JULIE K. MCCAMMON, M.D. PLAINTIFF

VS. CIVIL ACTION NUMBER: 03-C-66-2

WILLIAM L. FRAME, AND THE WEST VIRGINIA TRIAL LAWYERS ASSOCIATION DEFENDANTS

ORDER GRANTING SUMMARY JUDGMENT

On a previous day the defendants filed a motion for summary judgment in the above styled matter. The court, after reviewing said motion the memorandum in support, the memorandum in opposition, the reply to plaintiff's response in opposition to the motion, and after hearing argument of counsel and the pro se plaintiff and the Courts own independent research, is of the opinion that defendants motion for summary judgment should be granted and it is so Ordered. In accordance with Fayette County National Bank vs. Lilly 484 S.E.2d 232, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is now and at all times mentioned was a resident of Harrison County, State of West Virginia.

2. Defendant, William L. Frame, is an attorney who engages in the practice of law with his place of business in Morgantown, County of Monongalia, State of West Virginia.

3. At the time of this complaint, defendant Frame was the president of the West Virginia Trial Lawyers Association.

4. The plaintiff, Julie K. McCammon, M.D., has practiced medicine in the State of West Virginia since July of 1988.

5. On or about February 13, 2003, the plaintiff, Julie K. McCammon, M.D., instituted the above styled action against William L. Frame as the President of the defendant, West Virginia Trial Lawyers Association and the West Virginia Trial Lawyers Association.

6. The defendant, West Virginia Trial Lawyers Association membership is generally comprised of lawyers practicing within the State of West Virginia.

7. The plaintiff's complaint alleges that the defendants "engaged in the institution of frivolous, non-meritorious, and malicious lawsuits against physicians in the State of West Virginia resulting in the unwarranted and stifling increase in the cost of professional liability insurance for the plaintiff, Julie K. McCammon, M.D." The complaint does not allege that the named defendants were ever involved in any litigation directly with the plaintiff, Julie K. McCammon, M.D., or that the plaintiff, Julie K. McCammon, M.D., was ever a party to a "frivolous, non-meritorious and malicious lawsuit."

8. The defendant, William L. Frame, or the defendant, West Virginia Trial Lawyers Association, has never been a party or counsel in any civil action filed against the plaintiff.

9. This is not a class action lawsuit in accordance with WV Rules of Civil Procedure, Rule 23.

CONCLUSIONS OF LAW

1. It is clear that no action for negligence can be maintained in the absence of a legal duty. In order to establish a prima facie case of negligence in West Virginia, the plaintiff must show that the defendants have been guilty of some act or omission in violation of duty owed to the plaintiff. No action for negligence will lie without a duty broken. Parsley v. General Motor Acceptance Corp., 167 W.Va. 866, 280 S.E.2d 730 (1981); Jack v. Fritts, 193 W.Va. 494, 457 S.E. 2d 431 (1995); Aikens v. Debow, 208 W.Va. 486, 541 S.E. 2d 576 (2000); Hinkle v. Martin, 163 W.Va. 482, 256 S.E. 2d 768 (1979).

2. The question of the existence of a legal duty is a question of law for determination by the court. Aikens v. Debow, 208 W.Va. 486, 541 S.E. 2d 576 (2000).

3. To be actionable, negligence must be the proximate cause of the injury complained of and must be such as might have been reasonably expected too [*sic*] produce an injury. Haddox v. Suburban Lanes, Inc., 176 W.Va. 744, 349 S.E. 2d 910 (1986); Hartkey v. Crede, 140 W.Va. 133, 82 S.E. 2d 672 (1954); Anderson v. Baltimore & Ohio Railroad Company, 74 W.Va. 17, 81 S.E. 579 (1914).

4. With respect to the plaintiff's allegations of civil conspiracy", the West Virginia Supreme Court of Appeals has held that there can be no conspiracy to do that which is lawful in a lawful manner. Porter v. Mack, 50 W.Va. 581, 40 S.E. 459 (1901).

5. West Virginia Code § 55-7C-1, et seq., provides immunity from civil liability for qualified directors of certain non-profit entities. The statutory article defines a non-profit organization as to include any organization that acts as advocate for its members and that has as its members, individuals that are members of a particular

trade or industry. West Virginia Code, § 55-7C-2(4) (c) (i).

The defendant, William L. Frame, was the President of the West Virginia Trial Lawyers Association.[1] Mr. Frame served without compensation of the defendant, West Virginia Trial Lawyers Association, which is a non-profit organization. Accordingly, the defendant, William L. Frame, "shall not be held personally liable for negligence, either through act or omission, or whether actual or imputed, in the performance of the managerial functions performed" on behalf of the defendant, West Virginia Trial Lawyers Association. West Virginia Code § 55-7C-2(4)(c)(i).

6. When ruling on a motion for summary judgment a trial court must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to a judgment as a matter of law. Floyd v. Equitable Life Assurance Society, 164 W.Va. 661, 264 S.E. 2d 648 (1980); Estate of Helmick ex rel. Fox v. Martin, 192 W.Va. 501, 453 S.E. 2d 335 91994).

7. A dispute regarding a material fact is "genuine" only when a reasonable jury could render a verdict for the non-moving party if the record at trial were identical to the record compiled in the summary judgment proceeding. Powder Ridge Unit Owners Association v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E. 2d 872 (1996).

8. To oppose a properly supported motion for summary judgment, the non-moving party, in this case the plaintiff, must offer more than a mere scintilla of evidence sufficient for a reasonable jury to find in the plaintiff's favor. The evidence supplied by the plaintiff to oppose summary judgment must point to specific facts demonstrating that there is a trial worthy issue which is not only genuine, but also, involves a material fact.

---

[1] Mr. Frame is now the past president of the West Virginia Trial Lawyers Association going out of office in June 2003.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E. 2d 329 (1995).

9. The defendants have no legal duty to the plaintiff which would serve as a basis for the plaintiff's claim against them. Further the alleged damage and injury asserted in the plaintiff's complaint was not proximately caused by any conduct of these defendants.

10. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syllabus Point 3, Aetna Casualty & Surety Co. V. Federal Insurance Co. Of New York, 148 W.Va. 160, 133 S.E. 2d 770 (1963)." Syllabus Point I, Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E. 2d 247 (1992).

11. Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving has failed to make a sufficient showing on an essential element of the case that is has the burden to prove.

12. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is not genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

13. When a motion for summary judgement is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the

motion." Williams 459 S.E. 2d at 355 Accord Painter v. Peavy, 192 W.Va. 189, 451 S.E. 2d 755, 758 n. 5 (1994).

14. The prerequisites for a class action pursuant to West Virginia Rules of Civil Procedure, Rule 23, are not plead in this case.

Wherefore, based on the foregoing, the Court doth hereby grant defendants motion for summary judgment as a matter of law, all to which plaintiff excepts and objects.

The Clerk is directed to forward a copy of this Order to all counsel of record and pro se plaintiff.

Enter: December 4, 2003

/s/ Booker T. Stephens
Booker T. Stephens, Special Judge

APPENDIX E

IN THE CIRCUIT COURT OF HARRISON COUNTY,
WEST VIRGINIA

JULIE K MCCAMMON, M.D., PLAINTIFF

VS. CIVIL ACTION NUMBER 03-C-66-2

WILLIAM L. FRAME, and the
WEST VIRGINIA TRIAL
LAWYERS ASSOCIATION, DEFENDANTS

AMENDED ORDER

The Petitioner shall have until May 4, 2004 to file her appeal in the above-styled matter.

The Clerk is directed to forward a copy of this Order to Plaintiff, Julie K. McCammon, M.D. at her last known address of 300 Davisson Run Road, Ste. 303B, Clarksburg, WV 26301, to Gregory Schillace, Attorney at Law, P.O. Box 1526, Clarksburg, WV 26302, and to James A. Varner, Sr., Attorney at Law, McNeer, Highland, McMunn, and Varner, L.C., P.O. Drawer 2040, Clarksburg, WV 26302.

Enter: February 17, 2004

/s/ Booker T. Stephens
Booker T. Stephens, Special Judge